



UNIVERSITY OF  
**TORONTO**  
FACULTY OF LAW

# **BANKRUPTCY LAW**

## **SUPPLEMENTARY MATERIALS**

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**Faculty of Law**

**University of Toronto**

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# BANKRUPTCY LAW

## SUPPLEMENTARY MATERIALS

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**BANKRUPTCY LAW**  
**Winter Term 2007**

**Professor Tony Duggan and Mr Andy Kent**

**COURSE OUTLINE AND READING GUIDE**

**1. History and policy**

*1.1 The foundations of Canadian bankruptcy law*

- *Tasse Report*, CB p.5.

*1.2 The different kinds of insolvency proceedings*

*1.2.1 Commercial*

- Formal bankruptcy
- BIA proposals
- CCAA plans
- Receivership
- Winding-Up and Restructuring Act

*1.2.2 Consumer*

*Commentary*, CB, pp 611-616

- Formal bankruptcy
- BIA proposals

*1.3 Policy considerations*

- Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* (1986), CB, p. 22.
- Alan Schwartz, "A Normative Theory of Business Bankruptcy" *Virginia Law Review* (forthcoming), Part I , Supp. Mats.
- Elizabeth Warren, "Bankruptcy Policy" (1987) 54 *University of Chicago Law Review* 775, , p.34.

## 2. Formal bankruptcy

### 2.1 *Initiation of proceedings*

#### 2.1.1 Involuntary bankruptcy: application for bankruptcy order: *BIA, s.43*

- Re Dixie Market (Nurseries) Limited, CB, p.84.
- Re Holmes and Sinclair, CB., p.85.
- Re Mastronardi, CB., p.86
- Platt v. Malstrom, CB., p.93
- Bank of Montreal v. Scott Road Enterprises Ltd, CB., p. 97
- Re Inex Pharmaceuticals Corp., Supp.

#### 2.1.2 Voluntary bankruptcy: assignment for benefit of creditors: *BIA, s.49*

Re Dahl, CB, p.104

Re Wale, CB., p. 107

#### 2.1.3 Consequences of bankruptcy

- Automatic stay: *BIA, s.69.3*

Vachon v. Canada, CB, p.116

R v. Fitzgibbon, CB, p.125

- Effect on uncompleted executions: *BIA, ss 70, 73*
- Property vests in trustee: *BIA, s.71*
- Property not to be removed from province: *BIA, s. 76*
- Effect on banking transactions: *BIA, s.78*
- Duties of bankrupt: *BIA, ss 158-160*
- Bankruptcy offences: *BIA, ss 198-200*

#### 2.1.4 Administration

- Meetings of creditors: *BIA, ss 102-105*
- Procedure at meetings: *BIA, ss 105-115*
- Inspectors: *BIA, ss 116-120*
- First-time bankrupts: *BIA, s.168.1(a)*
- Examination of bankrupts: *BIA, ss 161-167*

## 2.2 *Property of the estate*

### 2.2.1 What is “property”?

- Chicago Board of Trade v. Johnson, CB., p.137
- *Commentary*, CB, pp 141-143
- Re Holley, CB, p. 143

### 2.2.2 Bankrupt’s income and other after-acquired property: *BIA*, ss 67(1)(c) , 68, 99

- Monteith (Trustee of) v. Monteith, Supp. Mats.
- Re Landry, CB, p. 582
- Bill C-55, ss 57 and 58

### 2.2.3 Exempt property: *BIA*, s.67(1)(b), (b.1)

- Re Fields, CB, p. 157
- Bill C-55, ss 57(1), inserting new BIA s.67(1)(b)-(b.3).

### 2.2.4 Secured creditors: *BIA*, ss 69.3 (2), 70(1), 71, 2(1)

- Re Giffen, CB, p. 148
- R. v. Ford Credit Limited, CB, p.325

### 2.2.5 Trusts: *BIA*, , ss67(1)(a), (2), (3)

- Re Ontario Worldair Limited, CB, p. 162
- Baltman v. Melnitzer, CB, p. 171

### 2.2.6 Set-off: *BIA*, s.97(3)

- Coopers & Lybrand v. Lumberland Building Materials, CB, p. 181

## 2.3 *Review of pre-bankruptcy transactions*

### 2.3.1 Fraudulent conveyances: *Fraudulent Conveyances Act*, Supp. Mats

- Profile United Industries Ltd v. Coopers and Lybrand, CB, p.196
- Optical Recording Laboratories v. Digital Recording Corp., CB, p.200



### 2.3.2 Settlements: *BIA*, ss 91-93

- Re Dowswell, CB, p.207
- Royal Bank of Canada v. Whalley, CB, p.212
- Royal Bank of Canada v. North American Life Assurance Co., CB, p.218

### 2.3.3 Reviewable transactions: *BIA*, s.100

- Standard Trustco Ltd (Trustee of) v. Standard Trust Co., CB, p.226

### 2.3.4 Preferences: *BIA*, ss 95-96 and *Assignments and Preferences Act*, Supp. Mats

- Canada Fruit Wholesalers Inc. (Trustee of) v. Hapco Farms, CB, p.237
- St Anne Nackawic Pulp Co. v. Logistics Stevedoring (Atlantic) Inc., Supp.
- Re Norris, Supp.
- Blaine L. Hudson, Trustee v. Benallack, CB, p. 242
- Duggan and Telfer, *Canadian Preference Law Reform*, Supp.

### 2.3.5 Reforms: *Bill C-55*, ss 3, 4(3), 71-76

## 2.4 *Executory contracts*

### 2.4.1 Contracts in general

#### (a) Trustee's right to affirm: *BIA*, ss 30-32

- Potato Distributors Inc. v. Eastern Trust Co., CB, p.260

#### (b) Trustee's right to reject

- In Re Thomson Knitting Co., CB, p.264
- Creditel of Canada Ltd v. Terrace Corp., CB, p.267
- New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd, Supp. Mats
- Armadale Properties Ltd v. 700 King St (1997) Ltd, CB, p.292

#### (c) Trustee's right to assign: *BIA*, s.30(1)(a)

#### 2.4.2 Landlord and tenant agreements: *BIA, s.146 and Commercial Tenancies Act*

(a) Trustee's right to affirm: *Commercial Tenancies Act, s.38(2)*

- Re Limestone Electrical and Supply Co. Ltd, CB, p.270
- Re Darrigo Consolidated Holdings, CB, p.274
- Re Vrablik, CB, p.278

(b) Trustee's right to reject: *Commercial Tenancies Act, s.39*

(c) Trustee's right to assign: *Commercial Tenancies Act, s. 38(2)*

- Re Limestone Electrical and Supply Co. Ltd, above
- Re Darrigo Consolidated Holdings, above

#### 2.4.3 Bill C-55 reforms

(a) Trustee's right to affirm: *new BIA s.84.2*

(b) Trustee's right to reject: *no provision (cf new BIA, s.65.11 re proposals)*

(c) Trustee's right to assign: *new BIA s.84.1*

#### 2.5 *Claims against the estate*

##### 2.5.1 Provable claims: BIA, ss 121, 135

##### 2.5.2 Consequences of non-provable claim: BIA, ss 169, 178(2), 2(1), "creditor"

##### 2.5.3 Contingent or unliquidated claims

- Re F.E.A. Griffiths Corporation , CB, p.125
- Re Carling Acceptance Ltd, CB, p.297
- Re Wiebe, CB, p.308
- Claude Resources Inc. (Trustee of) v. Dutton, CB, p.301
- Bittner v. Borne Chemical Company, Inc., CB, p.310

## 2.6 *Ranking of creditors and distribution of proceeds*

### 2.6.1 Introduction

### 2.6.2 Crown claims: *BIA*, ss 136, 67(2) and (3), 86, 87

- *Commentary*, CB, pp 350-352, 357-361, 374-376
- Barbara K. Morgan, “Should the Sovereign be Paid First – A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy”, CB, p.367

### 2.6.3 Protection of wage earners: *BIA*, s.136

- Kevin Davis and Jacob Ziegel, “Assessing the Economic Impact of a New Priority Scheme for Unpaid Wage Earners and Suppliers of Goods and Services”, CB, p.381
- Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals Joint Task Force Working Group on Priorities and Other Issues, *Report* (2004), Part 3, Supp. Mats.
- Bill C-55, ss.1 (Wage Earner Protection Program Act), 67 (new *BIA*, ss 81.3-81.5 enacting a super-priority rule for unpaid wages, etc and unpaid pension fund deductions), s.88 (amending *BIA*, s.136(1)(d)).

### 2.6.4 Unpaid suppliers: *BIA*, ss 81.1 and 81.2

- Jacob S. Ziegel, “New and Old Challenges in Approaching Phase Three Amendments to Canada’s Commercial Insolvency Laws”, CB, p.394
- *Port Alice Specialty Cellulose Inc. (Trustee of) v. ConocoPhillips Co* (BCCA, 2005), Supp. Mats.

### 2.6.5 Subordination of claims

- *Re Maxwell Communications Corp. plc*, Supp Mats
- *Re Air Canada Ltd*, Supp. Mats.
- *Re Blue Range Resource Corp.*, Supp. Mats
- Bill C-55, s.90 (adding new *BIA*, s.140.1)

## 2.7 *Discharge from bankruptcy: BIA, ss 168.1-182*

- Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* (1986), Chapter 10, Supp. Mats.
- Re McAfee, CB, p.593
- Re Nieuwenhout, Supp. Mats.
- Re Kelly, CB, p.599
- Personal Insolvency Task Force, *Final Report*, 14-16 (*Discharge of Student Loans*), CB, p.604.
- Bill C-55 reforms (*re* student loans, see s.107 amending BIA, s.178(1.))

## 3. **Consumer bankruptcy issues**

- Duggan, *Consumer Bankruptcy in Canada and Australia: A Comparative Overview*, Supp.

### 3.1 *Contributions from surplus income*

### 3.2 *Initiation of bankruptcy proceedings*

### 3.3 *Discharge*

### 3.4 *Alternatives to bankruptcy*

### 3.5 *Mandatory counselling*

## 4. **CCAA commercial reorganizations**

### 4.1 *Definition of debtor company*

- Enterprise Capital Management Inc. v. Semi-Tech-Corp. Supp.
- Re Stelco Inc.(1) , Supp.

### 4.2 *Commencing a CCAA reorganization*

#### 4.2.1 *The initial filing*

- CCAA, ss 9-11, Bill C-55, s.127 (*amending CCAA, s.10*)
- Re Quintette Coal Limited, *ex parte* Order, CB, p.486
- Re Stelco Inc.(2), Supp. Mats.
- Bill C-55, s.128, inserting new s.11.5 (removal of directors)



#### 4.2.2 Scope of stay proceedings

- *CCAA*, ss 11-11.5
- *Quintette Coal Limited v. Nippon Steel*, CB, p.490
- *Re Air Canada*, Supp. Mats
- *Re Richtree*, Supp. Mats

#### 4.3 Operating during a CCAA reorganization

##### 4.3.1 The monitor: *CCAA*, ss 11.7-11.8

- *Canadian Imperial Bank of Commerce v. Quintette Coal Ltd*, CB, p. 510
- Bill C-55, s.129, inserting new s.11.7 (court to appoint monitor), s.131, inserting new ss 23-25 (monitors) and s.128, inserting new s.11.52 (security for costs of monitor, etc).

##### 4.3.2 Executory contracts

###### (a) Contracts in general

- *Commentary*, CB, pp256-257
- *Re Doman Industries Ltd*, Supp. Mats.
- *Re Playdium Entertainment Corp.* Supp. Mats.

###### (b) Landlord and tenant agreements

- *Commentary*, CB, pp 255-256
- *Re Dylex Ltd*, CB, p.495
- *Alternative Fuel Systems Inc. v. Remington Development Corp.*, Supp. Mats.

###### (c) Collective bargaining agreements

- *Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mine Inc.*, CB, p.498
- Debtor's right to affirm: *new CCAA*, ss 34 (*limits on counterparty's right to terminate*), 11.4 (*critical suppliers*)
- Debtor's right to reject: *new CCAA*, ss.32(*general*), 33 (*collective agreements*)
- Debtor's right to assign: *new CCAA*, s.11.3.



#### 4.3.3 Debtor-in-possession financing/ Appointment of interim receiver

- Michael Rotsztain, “Debtor-in –Possession Financing in Canada: Current Law and a Preferred Approach” (2000) 33 CBLJ 283, 2837, CB, p.506
- Bill C-55, s.128, inserting new s.11.2 (interim financing)
- Skydome Corp. v. Ontario, Supp Mats.
- Re Royal Oak Mines Inc (1), Supp Mats
- Re Royal Oak Mines Inc. (2), Supp Mats
- Re Royal Oak Mines Inc. (3), Supp. Mats.
- General Electric Capital Canada Inc. v. Euro United Corp., Supp Mats.

#### 4.3.4 Asset sales

- \* Re Consumers Packaging Inc. (1), Supp Mats
- \* Re Consumers Packaging Inc. (2), Supp. Mats.

#### 4.4 *Claims*

##### 4.4.1 General: *CCAA, s.12*

##### 4.4.2 Priority of Crown claims: *CCAA, ss 18.2-18.5*

##### 4.4.3 Subordination of claims

- Re Air Canada Ltd, Supp. Mats.
- Re Blue Range Resource Corp., Supp. Mats.

##### 4.4.4 Set-off: *CCAA, s.18.1*

- Quintette Coal Limited v. Nippon Steel, CB, p.490
- Re Air Canada, Supp Mats

##### 4.4.5 Bill C-55 reforms

- General: new CCAA, ss 19-21
- Crown claims: new CCAA, s.6(2), ss 37-40
- Wage claims: new CCAA, s.6(4)
- Pension contributions: new CCAA, s.6(5)
- Subordination of equity claims: new CCAA, s.22(3)
- Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals Joint Task Force Working Group on Priorities and Other Issues, *Report* (2004), Part 6, Supp. Mats.

## 4.5 *Approval of CCAA plans*

### 4.5.1 Classification of creditors and voting

- Re Stelco Inc.(3), Supp. Mats.
- Re Canadian Airlines Corp. (1), Supp Mats.
- Re Canadian Airlines Corp. (2), Supp Mats.
- Bill C-55, s.131, inserting new s.22 (company may establish classes)

### 4.5.2 Status of shareholders

- Re Loewen Group Limited, CB, p.521

### 4.5.3 Court approval

- Re Anvil Range Mining Corp., CB, p.525

## 5 **BIA commercial reorganizations**

### 5.1 Introduction

- American Law Institute, *Transnational Insolvency Project: International Statement of Canadian Bankruptcy Law* (1997), pp 48-67 (Supp Mats)

### 5.2 Relationship with CCAA: CCAA, s.11.6, BIA,s.66(2)

- *Commentaries*, CB, pp 477 and 531

### 5.3 Initiation of proceedings: BIA, ss 50 (proposal), 50.4 (notice of intention)

### 5.4 The stay: BIA, ss 69-69.5

- John Deere Credit Inc. v. Doyle Salewski Lemieux Inc, CB, p. 333
- Re Cumberland Trading Inc., CB, p.532
- Re High Street Construction Ltd, CB, p.536

### 5.5 Governance

#### 5.5.1 The trustee: *BIA, ss 50, 50.4, 50.5*

#### 5.5.2 Inspectors: *BIA, s.56*

#### 5.5.3 Review of pre-filing transactions: *BIA, s.66*

#### 5.5.4 Executory contracts

(a) Contracts in general: *BIA*, s.65.1

- *Commentary*, CB, pp 256-257

(b) Landlord and tenant agreements: *BIA*, s.65.2

- *Commentary*, CB, pp 255-256
- *Re Carr-Harris & Co.*, CB., p.539

(c) Bill C-55 reforms

- Debtor's right to reject: *new BIA*, ss65.11(*general*), 65.12 (*collective agreements*).
- Debtor's right to assign: *new BIA*, ss 66(1.), 84.1

5.5.5 Debtor-in-possession financing: *Bill C-55*, s. 36, inserting *new BIA*, s.50.6 (*interim financing*)

#### 5.6 Claims

5.6.1 General: *BIA*, s.66(1)

5.6.2 Priority of claims: *BIA*, s.60

5.6.3 Pension plan contributions: *Bill C-55*, inserting *new BIA*, s.60 (1.5)

5.6.4 Subordination of equity claims: *Bill C-55*, inserting *new s.54(2)(a)(i)*

5.6.5 Limitations on voting: *Bill C-55*, inserting *new s.54(5) and (6)*

5.7 Classification of creditors and voting: *BIA*, ss 50, 51-54

5.8 Secured creditors: *BIA*, ss 50.1, 50(1.4), 54(2), 62(2) and also ss 69.1(2) and 244

- *Commentary*, CB, p.531

5.9 Court approval: *BIA*, ss58-61

- *Re Mernick*, CB, p.543
- *Re No.289 Taurus Ventures Ltd*, CB, p.547

5.10 Policing compliance: *BIA*, ss 62.1, 63

## 6 International insolvencies

### 6.1 Introduction

#### 6.1.1 Factors giving rise to international dimension

- Debtor personally connected with more than one country
- Debtor in State A has assets in State B
- Debtor in State A incurs liability to creditor in State B
- Debtor in State A incurs liability that is governed by law of State B

#### 6.1.2 Issues

- Does the presence of international factors prevent a Canadian court from asserting bankruptcy jurisdiction ?
- Are non-Canadian creditors entitled to participate in a Canadian bankruptcy?
- Can a Canadian trustee use the BIA stay provisions to prevent a creditor from taking action against the debtor outside Canada?
- If the debtor has assets outside Canada, can the trustee recover them?
- Do the BIA anti-avoidance provisions (settlement, preferences, etc) apply to transactions entered into outside Canada?
- Is a discharge from bankruptcy given by a Canadian court enforceable outside Canada?
- Does a BIA or CCAA reorganization prevent a dissenting creditor from suing for its debt outside Canada?
- When may a trustee in foreign proceedings seek the assistance of a Canadian court?
- What rules apply when concurrent bankruptcy proceedings are initiated against the debtor in two or more countries?

#### 6.1.3 Universality and territoriality

- Commentary, CB, p.642
- Holt Cargo Systems v. ABC Containerline NV (Trustees of), CB, p.659

### 6.2 Does the presence of international factors prevent a Canadian court from exercising bankruptcy jurisdiction?

#### 6.2.1 The extra-territorial reach of the BIA and CCAA

#### 6.2.2 Foreign recognition

#### 6.2.3 Rules governing foreign recognition



- Re Singer Sewing Machine Co. of Canada Ltd, CB, p.648
- Re Babcock & Wilcox Canada Ltd, CB, p.652

6.3 Are non-Canadian creditors entitled to participate in a Canadian bankruptcy?

6.4 Can a Canadian trustee use the BIA stay provisions to prevent a creditor from taking action against the debtor outside Canada?

6.5 If the debtor has assets located outside Canada, can the trustee recover them?

- CB, Commentary, p.643
- Holt Cargo, CB, p.659

6.6 Do the BIA avoidance provisions (settlements, preferences, etc) apply to transactions that are entered into outside Canada?

- In re Maxwell Communication Corporation plc, CB, p.633

6.7 Is a discharge from bankruptcy given by a Canadian court enforceable outside Canada?

- Re Bialek, CB, p.674

6.8 Does a BIA or CCAA reorganization prevent a dissenting creditor from suing to enforce its debt outside Canada?

6.9 Providing assistance

6.9.1 Reasons why assistance might be required

6.9.2 The Canadian provisions

- BIA, Part XIII,
- CCAA, s.18.6
- Bill C-55, s. 122 enacting a new BIA, Part XIII (Cross-Border Insolvencies) and s.131, enacting a new CCAA, Part IV (Cross-Border Insolvencies)

6.9.3 Provisions elsewhere

- United States: Bankruptcy Code, s.304 (discussed CB, pp 646-7)
- United Kingdom: Insolvency Act 1986, s.426



## 6.10 Concurrent proceedings

### 6.10.1 Factors giving rise to concurrent proceedings

### 6.10.2 Current law

- BIA, Part XIII
- CCAA, s.18.6

### 6.10.3 The Bill C-55 reforms (the UNCITRAL Model Law)

ALAN A. SCHWARTZ, "A NORMATIVE THEORY OF BUSINESS  
BANKRUPTCY" (2005) 91 *VIRGINIA LAW REVIEW* 1199.

*1. Introduction*

This article views bankruptcy through the lens of a single theory. Scholars, especially those of an economic bent, are coming to agree that a business bankruptcy law should function to reduce the cost of capital for firms. There appear to be few papers, however, that evaluate the basic structure of a modern bankruptcy code by a cost of capital yardstick alone. This partly is because disagreement exists about whether a bankruptcy law should pursue goals in addition to capital cost reduction. The novelty of this Essay lies in its single minded application to bankruptcy of the cost of capital metric and in its argument that only this metric should matter. The Essay focuses on US law for convenience.<sup>1</sup> Its conclusion holds that a bankruptcy law

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<sup>1</sup>Germany has recently amended its bankruptcy law to resemble more closely the American law and Italy is considering similar revisions. For a summary of German law, see The European Restructuring and Insolvency Guide 2002/2003 at 115-26. An analysis of American law thus may have more than parochial significance. An excellent history of American